

**Florida's Request To Assume Administration of a Clean Water Act Section 404 Program
(85 FR 57853, September 16, 2020) EPA-HQ-OW-2018-0640**

Code 1 Program Submission Elements

FDEP's Program Submission is Complete

Commenters (0082, 0223) claimed that the Florida application to assume the CWA Section 404 Program is complete. Commenter (0082) reasoned that if the EPA administrator determines that the state has the required authority to issue permits and administer the program, then the administrator is required to approve the state's assumption of the program.

Commenter (0223) recognized that a state Section 404 assumption application must provide the items listed at 40 CFR 233.10 (e.g., letter from the Governor, Attorney General's statement, agencies agreements, etc.); additional requirements for a state program are set forth in the rest of Part 233, including Subpart C (permit requirements); Subpart D (program operation); and Subpart E (compliance evaluation and enforcement). The commenter (0223) claimed that Florida's application contained each of these required items along with sufficient detail and explanation to allow for EPA to review.

FDEP's Program Submission is Incomplete

Commenters (0346, 0425, 0429-Preston Robertson, 0429-Lindsay Dubin, 0053, 0343, 0430-Chris Farrell, 0430-Faith Bickner, 0430-Rachael Uhland, 0430-Alison Kelly, 0431, 0438, 0503, 0514, 0524, 0543, 0226, 0075, 0524, 0051, 0386, 0412) claimed that the Florida application to assume the Clean Water Act Section 404 Program is incomplete.

These commenters (0503, 0226, 0543) and multiple form letter commenters (approximately 806) (form letter 0226) opposed the Florida Assumption, claiming that FDEP's rush to take over wetlands permitting has created a proposal that is incomplete, full of uncertainty, and will create additional chaos in Florida. Additionally, multiple commenters (approximately 294) submitted a form letter (form letter 0514) contending that the state of Florida's application is incomplete and does not provide the public with the entirety of information that was discussed during the state rule making phase.

Commenters (0053, 0343, 0430-Alison Kelly, 0430-Chris Farrell, 0386, 0412) indicated that the state's application package is incomplete and does nothing to guarantee that its protections will be as stringent as those provided under federal regulation. Commenter (0343) specifically mentioned the lack of information for proper enforcement, insufficient list of retained waters, and no demonstration that sufficient resources will be available to state agencies to execute the work. Commenter (0412) noted that the state does not sufficiently describe how it will replace the important protections of federal laws that apply to federal actions (i.e., when the USACE issues a permit) that will no longer be relevant to state actions (i.e. regarding the National Environmental Policy Act (NEPA) and Section 7 of the Endangered Species Act (ESA)).

Commenters (0346, 0425) noted that the application is incomplete because it cannot demonstrate that the Florida Section 404 Program can meet the no-jeopardy mandate. Commenters (0346, 0429-Lindsay Dubin) stated that the assumption application does not incorporate the programmatic biological opinion (BiOp) and statewide incidental take statement (ITS), even though these are the documents that the EPA and FDEP state that FDEP would rely on to ensure that the state can comply with the no-jeopardy mandate in the Section 404(b)(1) guidelines.

Commenters (0438, 0425, 0514, 0524, 0430-Faith Bickner, 0429-Preston Robertson, 0430-Rachael Uhland, 0051, 0429-Christina Reichert) argued that the state's application is incomplete and does not provide the public with the information that was promised during the state rule making phase; specifically noting a failure to describe or list the waters that will be assumed if Florida's application were to be granted. Commenter (0425) stated that the maps that were provided in the application are low resolution and nearly impossible to read with any specificity, adding that the list of waters is similarly vague, with no clarification about where these waterways are located. Commenter (0524) noted that the application reference both a digital map of retained waters and biological assessment in support of programmatic determinations with the FWS/NMFS; however, the public has not been allowed to see either of those documents, thus restricting their ability to determine how projects in Florida might be affected by the rule change and the public's ability to form questions to both the FDEP and EPA.

Commenters (0425, 0438, 0514, 0429-Lindsay Dubin, 0429Preston Robertson, 0430-Rachael Uhland, 0051, 0412, 0430-Chris Farrell, 0429-Christina Reichert) noted that FDEP's application has failed to explain how endangered species (under the Endangered Species Act) will be adequately protected under their proposed assumption of the Section 404 program. Commenter (0425) pointed to an anticipated programmatic biological opinion from the Fish and Wildlife Service and National Marine Fisheries Service that will dictate the procedures to be followed at the permit review level to ensure jeopardy will be avoided. However, the commenter stated that this document is not part of their application or available to the public for consideration. Commenters (0430-Chris Farrell, 0412) noted that the program faces significant outstanding legal concerns that could work against the goal of streamlining permitting in the state. The commenters offered as an example that the state's Section 404 Applicant's Handbook says the Department of Environmental Protection may use various resources to determine a project's potential impact on listed species; but noted that it does not state any minimum level of due diligence that will be completed. Additionally, the commenters contended that it is unclear based on the handbook whether the Florida Fish and Wildlife Conservation Commission or the FDEP will be making the initial listed species determinations. Commenter (0429-Lindsay Dubin) specifically called out their concern for the iconic Florida panther, Florida manatees, loggerhead sea turtles, the Saint Andrew beach mouse, and piping plovers, stating that their predicaments are made all the more dire by impacts of climate change. This same commenter questioned the state's ability to ensure the safety of these and dozens of other species that are on the brink of extinction where it is in control of this program.

Commenters (0425, 0343, 0430-Faith Bickner, 0430-Rachael Uhland, 0051, 0412, 0057) noted that FDEP did not answer "resource related" questions such as specifying the staffing and funding details necessary to operate the program and how the agency would "streamline" its currently understaffed and overworked wetlands division to take on a new federal program.

Commenter (0425) noted that the application is incomplete because it lacks the memoranda of agreement that explains how FDEP would implement the program. Commenter (0412) noted that the memorandum of understanding between FDEP, FWC, and the United States Fish and Wildlife Service (FWS) has not been signed by FWS. Therefore, the commenter asserted that EPA cannot consider the application complete without sufficient details that accurately reflect current thinking and a signed memorandum of understanding.

Commenter (0386) noted that FDEP stated in their submission that the only persons likely to be affected are those who are “currently subject to a 404 permit” issued by the Corps. The commenter argued that this response demonstrates that FDEP takes an unduly narrow view of operating a Section 404 program, and as a consequence, has taken an unreasonably limited view of the number of individuals and entities likely to be affected. The commenter concluded that FDEP wholly failed to provide a general description of those who are likely to be affected other than existing permittees.

Commenter (0386) noted that FDEP’s proposal remained fundamentally flawed in several respects, including: the failure to adopt all Section 404(b)(1) guidelines; failure to satisfy 40 CFR 233.11; failure to provide all components of a complete program submission as required under 40 CFR 233.10(b),; and does not meet all the requirements under the Clean Water Act (233.12(a)). The commenter concluded that the application must therefore be denied.

Commenters (0051, 0057, 0430-Faith Bickner, 0430-Rachael Uhland, 0386, 0412, 0429-Christina Reichert) contended that lack of key information in the state’s application make meaningful public comment and participation impossible. As such, commenter (0051) suggested that EPA suspend the public comment period and review of Florida’s application until the state cures these deficiencies and submits a complete program proposal to the agency. Commenter (0386) urged the EPA to reverse its determination that the application is complete or to extend the review period pursuant to 40 CFR 233.15(g) and the public comment period until all materials are provided and the public is given adequate notice and opportunity to comment in accordance with federal law or, instead, deny the application for incompleteness. Commenter (0412) suggested that EPA should ask the state to resubmit a complete package after addressing their concerns. Commenter (0429-Christina Reichert) stated that EPA must reject the department's attempt to speed through this process with a partial application when assumption implicates the future protection of vital state wetlands.